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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

CAPELETTI BROTHERS, INC.; WEEKLEY ASPHALT PAVING, INC.; WESTWIND CONTRACTING, INC.; and HARDRIVES COMPANY,

Petitioners,

v.

BROWARD COUNTY and L. A. HESTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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May 24, 1991

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31 p.

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners' petition for a writ of certiorari. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents has

declined to consent to the filing. Accordingly, this motion is necessary.

The Washington Legal Foundation is a national public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the cause of equal justice for citizens of all races and nationalities. To this end, WLF has appeared as *amicus curiae* before this Court and other state and federal courts on numerous occasions in civil rights cases. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). WLF has also appeared before this Court in numerous cases involving "standing" issues. *See, e.g., Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990).

WLF believes that all racial classifications established by governmental units are highly suspect and should be sustained in the face of court challenges only in the rarest of circumstances. WLF believes that courts should not create artificially high barriers that prevent those injured by such racial classifications from going to court to challenge the classifications. WLF is concerned that the Eleventh Circuit -- by announcing standing requirements unsupported by this Court's case law -- has created such barriers in this and related cases.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study

such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Amici believe that their experience in litigating civil rights and standing issues may prove of assistance to the Court in its consideration of this Petition. *Amici* also believe that their brief provides a perspective that differs from the perspective provided by the parties, due to *amici*'s strong commitment to a free market where individuals can compete without suffering from intentional discrimination because of the color of their skin.

For all the foregoing reasons, WLF and AEF respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Do construction contractors, who regularly bid on construction contracts offered by a county and who must comply with the county's race-conscious bid specifications in order to compete for the contracts, have standing to bring a facial constitutional challenge to the race-conscious requirements, when compliance with the county's requirements (1) limits the exercise of their business judgment to select subcontractors and suppliers; (2) increases their costs and risks; (3) decreases their profits; (4) limits their freedom to choose the subcontractors they believe could best complete the work; (5) puts in jeopardy the quality of work and the contractors' reputations; and (6) decreases the opportunities for them to subcontract and supply materials to other non-minority-owned contractors?

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

Recent opinions of this Court have made abundantly clear that government-mandated classifications based on race are highly suspect, and that racial classifications are subject to exacting constitutional scrutiny regardless whether they favor whites or favor racial minority groups that historically have suffered from racial prejudice. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-280 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, ___,109 S.Ct. 706, 721 (1989). As a result of such scrutiny, the Court struck down the Richmond, Virginia minority set-aside program at issue in *Croson* as a violation of the Equal Protection Clause. *Id.* at 723.

As the Eleventh Circuit itself has recognized, *Croson*'s rationale calls into question the constitutionality of many of the numerous state and local government programs that reserve a percentage of government contracts for minority contractors.[1] Accordingly, federal courts outside of the Eleventh Circuit have begun the arduous task of sorting out those minority set-aside programs that can survive the strict constitutional scrutiny mandated by *Croson* and those that cannot. The Eleventh Circuit, however, has pretermitted that effort by invoking unwarranted standing requirements against those seeking to challenge minority set-aside programs, thereby virtually insulating such programs from challenge. The Eleventh Circuit's crabbed view of standing in such cases, as enunciated in this case and a closely related case, *Cone*

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[1] *Northeastern Chapter of the Association of General Contractors of America v. City of Jacksonville, Florida*, 896 F.2d 1283, 1286 (11th Cir. 1990). *See also Associated Builders and Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 377 (5th Cir. 1990)(the Supreme Court in *Croson* "articulated its general disdain for race- and gender-based preferences").

Corporation v. Florida Department of Transportation, 921 F.2d 1190 (11th Cir. 1991), *cert. petition pending*, Case No. 90-1535, merits review by this Court.[2]

The facts as alleged in Petitioners' complaint must be accepted as true, as this case comes to the Court on review of the district court's Rule 12(b)(6) dismissal of the complaint. In brief, Petitioners are challenging a minority set-aside program established by Broward County, Florida in connection with the award of public construction contracts. Broward County established its Small Disadvantaged Business Enterprise Affirmative Action Program (the "Program" or "Set-Aside Program") in 1984 in order to assist "small, disadvantaged business enterprises" in obtaining public construction contracts.[3] Petitioners are non-minority construction firms that regularly bid on Broward County construction contracts and that do not qualify as disadvantaged business enterprises ("DBEs").

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[2] The relationship between this case and *Cone Corporation* could not be closer. The Eleventh Circuit panel hearing this case affirmed the district court's dismissal in a one-sentence order that cited the Eleventh Circuit's opinion in *Cone Corporation* as the sole basis for affirmance. Accordingly, although this brief is filed in No. 90-1587 alone, *amici* believe that granting certiorari in No. 90-1535 as well as in No. 90-1587 will provide the Court with a richly detailed record suitable for mapping standing requirements in the numerous federal court challenges to minority set-aside programs.

[3] The Set-Aside Program defines "small, disadvantaged business enterprises" as businesses owned and operated by one or more of the following categories of individuals: Black Americans, Hispanic Americans, Asian-Pacific Americans, Native Americans, Asian-Indian Americans, women, and other persons found to be "socially and economically disadvantaged" by the federal Small Business Administration. Broward County, Florida Code § 20-275(2)(a).

Under the Set-Aside Program, Broward County establishes a goal for DBE participation in each public construction contract put out for bid. In order to meet that goal for any given contract, non-DBEs (such as Petitioners) must include in their contract bid a commitment to subcontract to DBEs a percentage of the total contract work (in an amount corresponding to the percentage DBE goal).[4]

Petitioners filed suit against Broward County in the United States District Court for the Southern District of Florida in March 1990, alleging that the Set-Aside Program violated their rights under the Equal Protection Clause of the Fourteenth Amendment and seeking an injunction against further enforcement of the Program. None of the Petitioners contended that it had been denied a construction contract by Broward County solely by reason of its failure to meet a DBE participation goal in a contract bid. Nonetheless, the complaint alleged that Petitioners had been injured in numerous ways by the Set-Aside Program as it has been applied by Broward County since 1984. For example, Petitioners alleged that the DBE subcontracting requirement deprived them of the profits that they would have earned had they not been required to subcontract work to DBEs but instead had performed the work themselves. Petitioners further alleged that the set-aside requirements "limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs or risks, decrease its profits, limit its freedom to choose the subcontractor it believes

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[4] The Set-Aside Program provides that the DBE participation goal for any given contract may be waived for good cause shown. Broward County, Florida Code § 20-276. Nonetheless, bidders on public contracts are *required* as part of their bids "to assure the county in writing of their programmed goal attainment or of their justification that all reasonable efforts have been made to that end." Code § 20-276(6).

could best complete the work and put in jeopardy the quality of work and the contractor's reputation." Complaint ¶ 50.

The district court granted Respondents' motion to dismiss the case in June 1990, finding *inter alia* that Petitioners lacked standing to bring suit. *Capeletti Brothers, Inc. v. Broward County*, 738 F. Supp. 1415 (S.D. Fla. 1990).[5] The district court refused to accept Petitioners' allegations that the Set-Aside Program had reduced Petitioners' profits. Rather, the district court held:

> Accepting as true that the set-aside program increases costs, there is no injury to the bidders or their profits. It would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program by paying more to complete public construction contracts.

Id. at 1417. The court held alternatively that even if Petitioners could establish that they had been injured by the Set-Aside Program, such injury was insufficient to establish standing because:

> [E]ven if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have

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[5] The district court also dismissed the complaint based on another, closely related ground: that the case was not ripe for review. *Id.* at 1417. The court of appeals did not address the ripeness issue and thus that issue is not properly before the Court at this time.

> a competitive advantage over the plaintiffs since all the bidders comply with the program's requirements.

Id.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal in a one-sentence, unpublished order: "Affirmed on the basis of *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir. 1991)."[6] Petitioners filed a timely petition for writ of certiorari on April 12, 1991.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISIONS CONFLICT WITH OTHER FEDERAL COURT DECISIONS AND SERIOUSLY MISINTERPRET THIS COURT'S DECISIONS REGARDING STANDING TO SUE.

The court of appeals' decisions in this case and in *Cone Corporation* raise important issues of national significance. Ever since this Court's *Croson* decision, the

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[6] As noted above (*see* fn. 2), a petition for a writ of certiorari in *Cone Corporation* (No. 90-1535) currently is before the Court. In *Cone Corporation*, the Eleventh Circuit reversed a judgment striking down portions of a State of Florida minority set-aside program, finding that the plaintiffs lacked standing to challenge the program. Since the Eleventh Circuit's decision in this case incorporates the reasoning of *Cone Corporation*, this brief periodically cites to *Cone Corporation* when stating the Eleventh Circuit's rational for upholding the dismissal of Petitioners' complaint. The Eleventh Circuit's opinion in *Cone Corporation* underscores the close relationship between the two cases: in holding that the *Cone Corporation* plaintiffs lacked standing to challenge the State of Florida set-aside program, the Eleventh Circuit quoted extensively from the district court's opinion in this case. *See Cone Corporation*, 921 F.2d at 1210 n.57.

constitutionality of numerous state and local government minority set aside programs has been challenged in courts across the country; the "standing" issue addressed by the Eleventh Circuit is outcome-determinative in many such cases. Moreover, the court of appeals' decision seriously misinterprets this Court's decisions regarding standing to sue and is in direct conflict with a decision of the Seventh Circuit and several federal district court decisions. Accordingly, *amici* submit that the Court should grant the petitions for writs of certiorari in Nos. 90-1535 and 90-1587.

A. That Petitioners' Injury May Be Shared Equally by Other Contractors Does Not Negate Petitioners' Showing That They Have, in Fact, Been Injured.

The basic principles underlying what a plaintiff must show in order to establish "standing" to sue in federal court are not seriously disputed by the parties and were accurately set forth by the courts below. Article III of the Constitution requires the party who invokes a federal court's authority to show: (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (also referred to "injury in fact"); (2) "that the injury fairly can be traced to the challenged action"; and (3) that the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The Eleventh Circuit went astray due to its misperception of what constitutes an "injury in fact" for purposes of standing analysis. The Eleventh Circuit held that Petitioners failed to adequately allege "injury" because they did not allege that they lost any particular

contract as a result of the Set-Aside Program; the court of appeals held that other types of alleged injury were insufficient to satisfy the "injury in fact" requirement. *Cone Corporation*, 921 F.2d at 1206-1210. The district court also viewed loss of a particular contract due to the Set-Aside Program as an essential ingredient of a cognizable injury. *Capeletti Brothers*, 738 F. Supp. at 1417.

The lower courts' definition of what constitutes "injury in fact" is seriously in error. Clearly, one who alleges loss of a contract due to racial discrimination has alleged a significant injury; but one need not allege such a significant injury in order to adequately plead "injury in fact." This Court has made clear that even an "identifiable trifle" can be sufficient to establish "injury in fact" (*United States v. Students Challenging Regulatory Agency Procedures [SCRAP]*, 412 U.S. 669, 689 n.14 (1973)), and Petitioners' alleged injuries amount to far more than an "identifiable trifle." Petitioners have alleged that the DBE subcontracting requirement deprived them of the profits that they would have earned had they not been required to subcontract work to DBEs but instead had performed the work themselves. Petitioners further alleged that the Set-Aside requirements "limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs or risks, decrease its profits, limit its freedom to choose the subcontractor it believes could best complete the work and put in jeopardy the quality of work and the contractor's reputation." Complaint ¶ 50. In order to establish standing at the trial/summary judgment stage, Petitioners would have to introduce evidence to support its allegations of injury; but at the pleadings stage, Petitioners' allegations -- by pro-

viding numerous examples of out-of-pocket monetary loss -- are more than sufficient to plead "injury in fact."[7]

The lower courts held that the alleged injuries cited above did not constitute "injury in fact" because any such injuries were not unique to Petitioners but rather were injuries suffered by all construction contract bidders. *See Cone Corporation*, 921 F.2d at 1210 n.57 ("[e]ven if the contractor does not always include the increased cost in its bid, as the plaintiffs' evidence seems to indicate, the resulting smaller profits are a problem common to all contractors"); *Capeletti Brothers*, 738 F. Supp. at 1417 ("the plaintiff cannot show that this harm is unique to them and different from other bidders ... no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirements"). That holding is directly contrary to numerous decisions of this Court; there is no requirement that an injury must be unique to plaintiffs in order to qualify as "injury in fact"

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[7] Petitioners' allegations of injury must be accepted as true, as this case comes to the Court on review of the district court's Rule 12(b)(6) dismissal of the complaint. *See Lujan v. National Wildlife Federation*, 110 S.Ct 3177, 3189 (1990); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party"). The district court did not believe Petitioners' allegations that they had been injured; the district court thought that only an "irrational businessman" would not factor into his bid price any costs associated with complying with the Set-Aside Program. *Capeletti*, 738 F. Supp. at 1417. The district court apparently recognized, however, that a dismissal based on a refusal to credit well-pled allegations of injury would have been improper, because it went on to base its "no standing" finding on other grounds "even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid." *Id.* While it is conceivable that Petitioners would be unable to demonstrate at trial that they did not factor all such costs into their bids, that issue clearly cannot be resolved at the pleadings stage.

for standing purposes. *See, e.g., Warth v. Seldin*, 422 U.S. at 501 ("[o]f course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, *even if it is an injury shared by a large class of other possible litigants*") (emphasis added); *SCRAP*, 412 U.S. at 688 ("[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion").[8]

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[8] While the Court has squarely rejected claims that a plaintiff must demonstrate the uniqueness of his injury in order to establish Article III "injury in fact," the Court has imposed "prudential" limitations on standing such that standing is denied where "the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499. Thus, the Court denied standing to the plaintiffs in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), who claimed to have been injured in their capacity as citizens of the United States by alleged violation of the Constitution's Incompatibility Clause by Members of Congress who simultaneously served as members of the armed forces reserves. The Court said that standing to sue may not be predicated merely on U.S. citizenship "because of the necessarily abstract nature of the injury all citizens share." *Id.* at 220. The Court said that plaintiffs should not be accorded standing to sue in such cases because such abstract injuries are not sufficiently concrete to enable "a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Id.* at 221. The "prudential" limitations upon standing discussed in *Warth* and *Schlesinger* are clearly inapplicable to this case. Even if Petitioners' injuries are suffered by all other bidders on Broward County construction contracts, the class of those suffering harm is still a tiny percentage of U.S. citizens: it consists of a group of no more than several hundred construction companies. There is no suggestion that Petitioners' alleged injuries are in any way "abstract"; to the contrary, Petitioners allege that their injuries have been in the form of concrete, dollars-and-cents losses.

Moreover, the lower courts' findings that no contractors had a competitive advantage over Petitioners is contradicted by the record below. As the Eleventh Circuit noted in *Cone Corporation*, "A DBE prime contractor that is the low bidder on a contract containing a DBE goal is not required to meet the subcontracting goal, as its participation as prime contractor allows the entire amount of the contract to be counted toward the overall DBE goal." *Id.*, 921 F.2d at 1196 n.20. Thus, DBE prime contractors have a competitive advantage over Petitioners, because they have a greater flexibility in choosing the most-qualified and lowest-cost subcontractors or in electing not to subcontract any work and thereby increasing their profit. In sum, the lower courts' conclusion that Petitioners did not suffer "injury in fact" is a clear error of law.

B. The Eleventh Circuit's Decisions Directly Conflict With a Seventh Circuit Decision and Numerous Other Federal Court Decisions.

The Eleventh Circuit's decisions in this case and in *Cone Corporation* merit review by this Court for the additional reason that they conflict with a decision of the Seventh Circuit as well as with decisions from numerous other federal courts. It is essential that the Court grant certiorari in order to resolve the confusion that reigns in the lower federal courts regarding what constitutes "injury in fact" in cases challenging minority set-aside programs.

In *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), the Seventh Circuit struck down portions of several Wisconsin highway contract minority set-aside programs as violations of the Equal Protection Clause. Before reaching the merits of the programs, the Seventh Circuit explicitly found that the plaintiff contractors had been injured by the programs:

"The reason the latter ... feature of the programs [requiring that subcontracts be granted to DBEs] *harms the contractors* is that it both requires them to award some subcontracts to contractors that are not the low bidders and (like the prime set-aside program) limits their own ability to compete for subcontracts." *Id.* at 421 (emphasis added).[9] Accordingly, the Seventh Circuit's *Milwaukee County Pavers* decision is in direct conflict with the Eleventh Circuit's decisions in this case and *Cone Corporation*; the very same allegations that the Eleventh Circuit found insufficient to bestow standing on Petitioners were found sufficient by the Seventh Circuit to permit it to reach the merits of a challenge to a minority set-aside program.

The Eleventh Circuit's decisions in this case and *Cone Corporation* also appear to be in direct conflict with another recent Eleventh Circuit opinion: *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991). *S.J. Groves* involved a challenge to two Georgia minority set-aside programs; the court held that the plaintiffs had standing to challenge one of the programs (where they had lost a contract due to an alleged failure to make a good-faith effort to meet a DBE goal) but not the other. Although the court rejected Grove's claim that the second program's subcontracting requirement constituted "injury in fact" because it prevented Groves from earning an extra profit by performing the subcontracts itself, the court did so *solely* because Groves had never bid on any contracts under the challenged program. *Id.* at 758. The clear implication of *Groves* is that one who does regularly bid on contracts subject to a DBE subcontract goal -- as is true of Petitioners in this case -- can establish "injury

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[9] No plaintiff in *Milwaukee County Pavers* specified any particular contract that it allegedly had lost as a result of the Wisconsin set-aside programs.

in fact" by alleging that one is prevented from performing the subcontracts oneself.

Other courts of appeals have reached the merits of such challenges without discussing the standing issue. Given that a federal court lacks jurisdiction to hear a case brought by a plaintiff lacking Article III standing (and thus that a federal court has an obligation to dismiss a case brought by a plaintiff lacking standing, even when the parties fail to raise the standing issue), the willingness of other courts of appeals to reach the merits of challenges to set-aside programs -- despite a lack of any showing by the plaintiffs that they had lost contracts as a result of the programs -- is some indication that those courts implicitly decided the standing issue in favor of the plaintiffs.[10] *See, e.g., Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989); *Associated General Contractors of*

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[10] Indeed, the court in *Cone Corporation* conceded that two other Eleventh Circuit panels had reached the merits of challenges to set-aside programs in factually similar circumstances; the court attempted to distinguish those cases by arguing that no view on the standing issue could be inferred from the two prior decisions because neither decision directly addressed that issue. *Cone Corporation*, 921 F.2d at 1207 n.52. While one of the two prior decisions (*Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S.Ct. 516 (1990)) can plausibly be distinguished on that ground, the other cannot. In *Northeastern Florida Chapter of the Association of General Contractors v. City of Jacksonville, Florida*, 896 F.2d 1283 (11th Cir. 1990), the majority reached the merits of a set-aside program challenge despite the objections of Judge Tjoflat (in a special concurrence) that the plaintiffs lacked standing to raise the challenge. Since Judge Tjoflat's special concurrence had called attention to the standing issue and since the majority clearly understood that it lacked jurisdiction to hear the case if the plaintiffs lacked standing, one can reasonably conclude that the majority decided that the plaintiffs had standing. Accordingly, the Eleventh Circuit's decisions in this case and in *Cone Corporation* also conflict with the Eleventh Circuit's *Northeastern Florida* decision.

California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

Moreover, as the Eleventh Circuit acknowledged in *Cone Corporation*, 921 F.2d at 1210 n.57, its decisions are in direct conflict with several federal district court opinions. *See Contractors Association v. City of Philadelphia*, 735 F. Supp. 1274, 1283-84 n.3 (E.D. Pa. 1990) (finding standing for an association of contractors who alleged, *inter alia*, that the expenses of one contractor member on a specific contract were higher because of MBE requirements); *Rhode Island Chapter, Associated General Contractors v. Kreps*, 450 F. Supp. 338, 346-47 n.3 (D.R.I. 1978) ("even the successful bidder reduces his profit by having to subcontract work he could have performed himself"); *Constructors Association v. Kreps*, 441 F. Supp. 936, 945-46 (W.D. Pa. 1977).

On the other hand, *Cone Corporation* is not simply an aberrant decision that this Court can safely ignore because it is unlikely to be followed elsewhere. At least one federal district court outside the Eleventh has cited *Cone Corporation* as authority for finding that a contractors' association lacked standing to challenge a minority set-aside program. *See Michigan Road Builders Association, Inc. v. Blanchard*, 1991 U.S. Dist. LEXIS 5028 (W.D. Mich. 1991).[11] Accordingly, the Court should grant certiorari in this case to resolve the conflict within

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[11] Ironically, the lawsuit dismissed by the district court for lack of standing involved precisely the same parties and virtually the same issues as were involved in a successful challenge to an earlier Michigan minority set-aside program. Although the standing allegations in the prior lawsuit differed little from the standing allegations in the suit dismissed by the district court, this Court summarily affirmed a Sixth Circuit decision striking down the earlier program. *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989).

the lower federal courts regarding this important and recurring aspect of standing doctrine.

II. THE COURT OF APPEALS' DECISIONS IMPROPERLY INJECT AN EXHAUSTION OF REMEDIES REQUIREMENT INTO EQUAL PROTECTION LITIGATION.

The Eleventh Circuit ultimately grounded its dismissal of these cases on the plaintiffs' alleged failure to establish standing. However, much of the discussion in *Cone Corporation* focused on the many administrative avenues for relief allegedly available to a contractor unhappy with the DBE set-aside program. *See, e.g., id.*, 921 F.2d at 1192-1203, 1206-09. The focus and language of *Cone Corporation* suggest that the Eleventh Circuit has incorporated an exhaustion of administrative remedies requirement into its standing analysis. Denial of standing to plaintiffs who allegedly have failed to exhaust remedies is absolutely contrary to this Court's case law and provides an additional reason to review the decisions below.

The courts below correctly noted that the plaintiffs were not challenging past contract awards or seeking to recover damages, but rather were mounting facial challenges to the set-aside programs. *Id.* at 1203-05. Accordingly, the courts held (again correctly), that one alleging "injury in fact" must allege facts demonstrating a likelihood that "he is likely to suffer future injury." *Id.* at 1203. The courts below erred, however, in concluding that since the challenged programs permitted contractors to protest the application of set-aside goals to particular contracts, there was no evidence that any such goals would ever be applied to the plaintiffs and thus that they

would ever suffer any injury. *See id.* at 1206-09; *Capeletti Brothers*, 738 F. Supp. at 1417.[12]

In so holding, the Eleventh Circuit is, in effect, requiring contractors to exhaust state administrative remedies before bringing a facial challenge to a minority set-aside program. Under the Eleventh Circuit's rationale, a contractor could never seek to enjoin future enforcement of a minority set-aside program by bringing a facial challenge to the program, because there can be no evidence that the program will be enforced as written (and thus no evidence of "injury in fact") unless the contractor pursues administrative remedies. Such an exhaustion requirement in civil rights cases of this sort is clearly contrary to established case law of this Court. *See Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies not a prerequisite to action (as here) under 42 U.S.C. § 1983).

Petitioners cannot, of course, predict with 100% assurance that the Set-Aside Program will be enforced in an unconstitutional manner in the future and that they will thereby be injured; but such 100% assurance is not required to establish "injury in fact." Rather, Petitioners need only establish a likelihood of future injury, which likelihood can be established by alleging a history of prior constitutional violations causing injury to Petitioners. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea*

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[12] Indeed, the Eleventh Circuit attempted to distinguish these cases from this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), on precisely this ground. The Court held in *Fullilove* that a group of contractors had standing to bring a facial challenge to the federal Public Works Employment Act of 1977. *Id.* at 480 n.71. The Eleventh Circuit distinguished *Fullilove* by noting that the plaintiffs in these two cases had a protest procedure available to them, while the plaintiffs in *Fullilove* did not. *Cone Construction*, 921 F.2d at 1209 n.56.

v. Littleton, 414 U.S. 488, 495-96 (1974) ("[o]f course, past wrongs are evidence bearing on whether there is a real or immediate threat of repeated injury"). Petitioners have made such allegations. *See* Petitioners' Complaint ¶¶ 48-54. To hold that Petitioners have not made sufficient allegations to establish "injury in fact" is to improperly incorporate into standing doctrine a requirement that they exhaust all administrative remedies made available by Respondents before coming into federal court -- despite the absence of any evidence that Respondents will not continue to enforce the Set-Aside Program in an unconstitutional manner.

In sum, the Eleventh Circuit's incorporation of an exhaustion of remedies requirement into the showing necessary to establish standing to challenge a minority set-aside program is contrary to this Court's case law and thus provides an additional reason for granting certiorari in this case.

III. THE ELEVENTH CIRCUIT HAS ESTABLISHED A RACIAL DOUBLE-STANDARD IN DETERMINING WHO HAS STANDING TO SUE.

The Eleventh Circuit's decisions in this case and in *Cone Corporation* are especially troublesome when one contrasts them with the liberal standing requirements normally employed by the Eleventh Circuit, particularly in cases involving claims of racial discrimination against members of racial minority groups. This racial double-standard has no place in modern American jurisprudence. The court should grant certiorari in this case in order to reaffirm the principles that justice is color-blind and that all citizens -- regardless of race -- have equal access to the courthouse door.

Smith v. Meese, 821 F.2d 1484 (11th Cir. 1987), is typical of the liberal approach on standing questions normally taken by the Eleventh Circuit in cases brought by racial minority groups. In *Smith*, the plaintiffs -- black voters and elected officials in Alabama -- alleged that the U.S. Attorney General and other top Justice Department officials were violating their constitutional rights by launching investigations into alleged election crimes committed by blacks but failing to conduct similar investigations into alleged election crimes committed by whites. The suit alleged that this discriminatory enforcement policy had "chilled" the plaintiffs' exercise of their political and associational rights, *but none of the plaintiffs was actually the target of any Justice Department investigation*. *Id.* at 1495. The court held that the plaintiffs had standing to pursue their claims; an allegation that the plaintiffs, along with other citizens, had suffered a generalized "harm from an unconstitutional pattern and practice of discriminatory prosecutions and investigations" focused on others, was held sufficient to establish "injury in fact." *Id.*

Similarly, in *Watts v. Boyd Properties*, 758 F.2d 1482 (11th Cir. 1985), the Eleventh Circuit held that a black "tester" had standing to challenge the defendant's allegedly racially discriminatory rental policies, even though she lacked any intent to rent an apartment from the defendant had one been offered. The court said, "[E]ven if a tester is motivated solely by the desire to challenge the legality of allegedly discriminatory practices, this is a sufficient purpose to confer standing." *Id.* at 1482.[13] And

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[13] In so holding, *Watts* goes well beyond this Court's holding that Fair Housing Act "testers" have standing to sue for violations of the Act if they can demonstrate that a defendant's conduct deprived them of the "important social, professional, business and economic, political

(continued...)

in *EEOC v. Mississippi College*, 626 F.2d 477, 483-84 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981),[14] the court of appeals held that a white woman had standing to bring a Title VII claim against her employer based on allegations of racial employment discrimination against blacks; the court held that she had sufficiently alleged injury because the alleged practices violated "her own personal right to work in an environment unaffected by racial discrimination."

Indeed, the Eleventh Circuit liberal approach to standing requirements appears to extend to everyone except white males raising race and sex discrimination claims. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989) (citizens of Dade County, Florida have standing to challenge operation of federal alien detention center within the county, despite fact that all citizens of county are equally affected by its operation); *Sims v. Florida Department of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1458-59 (11th Cir. 1989) (*en banc*) (importers of "gray market" automobiles had standing to challenge state law regarding titling of such automobiles, despite fact that law had no direct effect on importation); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (citizens of city had standing to

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[13] (...continued)
and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 361, 376 (1982). Granting standing based on a mere "desire to challenge the legality of allegedly discriminatory practices" (*Watts*, 758 F.2d at 1485) does not even require the plaintiff to live in the community allegedly affected by the discriminatory housing practices.

[14] The Eleventh Circuit has adopted as binding precedent within the circuit all Fifth Circuit decisions rendered prior to October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

challenge inclusion of word "Christianity" on city seal, despite fact that the word was too small to be legible); *Lynch v. Baxley*, 744 F.2d 1452, 1457 (11th Cir. 1984) (plaintiff had standing to challenge civil commitment procedures, despite fact that he was not in custody at time of filing suit, because there was reasonable likelihood that he would again be committed and would again be subjected to allegedly unconstitutional commitment procedures).

There is little doubt that under the standing requirements normally imposed by the Eleventh Circuit, Petitioners have standing to challenge the Set-Aside Program. If a mere "desire to challenge the legality of allegedly discriminatory practices" was sufficient to confer standing on the plaintiff in *Watts*, then surely Petitioners -- who have alleged significant economic loss as a result of an allegedly discriminatory set-aside program -- have standing to challenge the program. Accordingly, the need to eliminate the racial double-standard imposed by the Eleventh Circuit in the standing arena provides an additional reason for issuing a writ of certiorari in this case.

CONCLUSION

For the foregoing reason, *amici* respectfully submit that the petition should be granted.

Respectfully submitted,

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